Supreme Court, U.S.
FILED
APR 23
CLERK

No. 02-473

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

LASHAWN LOWELL BANKS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER.

(List of Counsel on Inside Front Cover)

Of Counsel:

GENE VOEGTLIN, ESQ.
International Association of
Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

RICHARD WEINTRAUB, ESQ.
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram
Chicago, Illinois 60657-4330

Counsel For Amici Curiae:

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
841 West Touhy Ave.
Park Ridge, Illinois
60068-3351
E-mail: AELE@aol.com

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois
60137-4900
Tele/Fax (630) 858-6392
E-mail: lelp@xnet.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii, iii

BRIEF OF *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 8

LAW ENFORCEMENT OFFICERS EXECUTING A WARRANT TO SEARCH FOR ILLEGAL DRUGS DID NOT VIOLATE THE FOURTH AMENDMENT AND 18 U.S.C. § 3109, WHEN THEY FORCIBLY ENTERED A SMALL APARTMENT IN THE MIDDLE OF THE AFTERNOON, 15-20 SECONDS AFTER KNOCKING AND ANNOUNCING THEIR PRESENCE. THE DECISION OF THE COURT BELOW CREATES A COMPLEX AND UNWORKABLE MATRIX OF RULES THAT HAVE BEEN REJECTED BY THIS COURT IN PRIOR CASES DEALING WITH THE EXECUTION OF SEARCH WARRANTS. 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page**

Richards v. Wisconsin, 520 U.S. 385 (1997) ..... *passim*
United States v. Banks, 282 F.3d 699 (9th Cir. 2002) 3
United States v. Goodson, 165 F.3d 610 (8th Cir.), cert. denied, 527 U.S. 1030 (1999) 10
United States v. Jenkins, 175 F.3d 1208, cert. denied, 528 U.S. 913 (1999) 10
United States v. Jones, 133 F. 3d 358 (5th Cir.), cert. denied, 523 U.S. 1144 (1998) 10
United States v. Markling, 7 F.3d 1309 (7th Cir. 1993) 10
United States v. Pennington, 2003 U.S. App. Lexis 5832 (6th Cir. 2003) 9
United States v. Pinson, 321 F.3d 558 (6th Cir. 2003) ... 9
United States v. Ramirez, 523 U.S. 65 (1998) ..... *passim*
United States v. Sargent, 319 F.3d 4 (1st Cir. 2003) 9
United States v. Spikes, 158 F. 3d 913 (6th Cir. 1998) 10
Whren v. United States, 517 U.S. 806 (1996) 9
Wilson v. Arkansas, 514 U.S. 927 (1995) ..... *passim*

Constitution & Statute

U.S. Const. Amend. IV ..... *passim*
18 U.S.C. 3109 4

Periodicals

Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on "Knock and Announce,"* 25 AM. J. CRIM. L. 545 (1998) 10
Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 U. MO. K. C. L. REV. 559 (1998) 10

Briefs

AELE *Amici* Brief for Respondent, *Richards v. Wisconsin*, 520 U.S. 385 (1997) 8
AELE *Amici* Brief for Petitioner, *United States v. Ramirez*, 523 U.S. 65 (1998) 8
AELE *Amici* Brief for Respondent, *Wilson v. Arkansas*, 514 U.S. 927 (1995) 8, 9

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 19,000 members in 100 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 21,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the execution of search warrants and warrantless searches; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policy on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the

ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

At approximately 2 p.m., municipal police officers and FBI agents executed a search warrant for cocaine and drug paraphernalia at respondent's small, two bedroom apartment. The search warrant was based on information, corroborated by a controlled buy, that respondent was selling cocaine at his apartment. Knowing that the apartment was a small, two bedroom unit, the officers first positioned themselves at the front and rear of the apartment and then loudly knocked on the front door and announced "Police search warrant." The knock and announcement was so loud that it could be heard by the officers positioned at the rear door of the apartment.

After waiting 15-20 seconds and, hearing no response, the officers forcibly entered the apartment by breaking down the front door. The officers discovered respondent standing outside the bathroom, having just emerged from the shower; a search of the apartment yielded a number of weapons, at least one of which was loaded, a bullet-proof vest, rock and crack cocaine, and a scale. Respondent was charged with possession of a controlled substance with intent to distribute it and possession of a firearm as an unlawful drug user.

A three judge panel of the Ninth Circuit Court of Appeals, one judge dissenting, reversed respondent's conviction, *United States v. Banks*, 282 F.3d 699 (9th Cir. 2002), ruling that the officers, having knocked and announced and received no response, failed to wait a

reasonable amount of time (15-20 seconds) before forcibly entering the apartment, thereby rendering the search in violation of the Fourth Amendment and the federal statute dealing with the execution of search warrants, 18 U.S.C. 3109.

The dissenting judge in the court below argued that the 15-20 second wait was constitutionally sufficient, emphasizing that the apartment was small, the search was executed in the middle of the afternoon, the officers had strong evidence of drug dealing (including a controlled buy establishing that respondent was selling drugs out of his apartment), and the officers could reasonably have been concerned about the destruction of evidence. He argued that the majority opinion provided no meaningful guidance to law enforcement officers and noted that because respondent was in the shower at the time the officers approached the apartment and did not hear the officers knock and announce, additional delay before entry would have made no difference in how the events unfolded.

The dissenting judge further noted that many courts have held that a 15-20 second (or shorter) delay before entering a residence to execute a search warrant was reasonable under similar circumstances.

SUMMARY OF ARGUMENT

In reaching its decision, the panel (2-1 decision) used a four-part matrix for determining how long officers must wait, after knocking and announcing their presence and hearing no response, before they may enter a residence to execute a valid search warrant. This mechanical approach is inconsistent with this Court's long-standing recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of [search] warrant[s]." *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

Under this four-part matrix, the court below has created four categories of knock and announce scenarios, each requiring a different lapse of time before an officer may enter a residence after knocking and announcing and receiving no response. Police officers must pause and work out the following calculus before deciding how and when to enter premises to serve a search warrant:

- For entries in which exigent circumstances exist and non-forcible entry is possible, entry may be made simultaneously with or shortly after an announcement of the officers' office and purpose.
- For entries in which exigent circumstances exist and forced entry by destruction of property is required, there must be specific inferences of exigency.
- For entries in which no exigent circumstances exist and non-forcible entry is possible, an explicit refusal of admittance or a lapse of a "significant" amount of time is necessary.
- For entries in which no exigent circumstances exist and forced entry by destruction of property is required, there must be an explicit refusal of

admittance or a lapse of an even more substantial amount of time.

This, however, is not the full extent of required calculations for officers. The court's matrix for determining whether officers have waited a sufficient period of time before entering also turns on two additional factors: (1) whether the entry was forcible and thus involved the destruction of property, and (2) whether exigent circumstances existed.

The court then went to yet another level and articulated a non-exhaustive list of factors to be considered in assessing the reasonableness of the officers' waiting period once the proper entry category has been determined by the police. These additional factors must also be used by the police in making their final decision on how and when to make an entry for service of the warrant.

These factors include:

- Size of the residence
- Location of the residence
- Location of the officers in relation to the main living or sleeping areas of the residence (presumably, if known)
- Time of day
- Nature of the suspected offense
- Evidence demonstrating the suspect's guilt
- The suspect's prior convictions and, if any, the type of offense for which he was convicted
- Any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

Amici take the position that the court's complex and

confusing categorical scheme is (a) unworkable; and (b) inconsistent with the general reasonableness standard mandated by this Court in prior cases on the subject of the execution of search warrants. This Court has required that the "general touchstone of reasonableness which governs Fourth Amendment analysis * * * governs the method of execution of the warrant." *Ramirez*, 523 U.S. at 71; *Wilson*, 514 U.S. at 934 (the Fourth Amendment does not "mandate a rigid rule of announcement that ignores countervailing law enforcement interests"); and *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997) (same).

In addition to contradicting prior jurisprudence of this Court, the ruling of the court below is contrary to the rulings of the majority of other state and federal courts that have interpreted and applied *Ramirez*, *Wilson*, and *Richards*.

Most importantly from the vantage point of *amici* as law enforcement administrators, we assure the Court that complex rules are patently unworkable in the hands of the best-trained police officers. Officers would be required to work out these rules in a few seconds of time while serving a search warrant. This is not appropriate for officers attempting to act within the short window of time necessary to serve search warrants while defeating the destruction of evidence and ensuring their personal safety.

Amici submit that this calculus was designed for the quiet, post-event reflection of attorneys and judges, not for on-the-scene activities of law enforcement officers carrying out their duties within the requirements of the Fourth Amendment.

ARGUMENT

LAW ENFORCEMENT OFFICERS EXECUTING A WARRANT TO SEARCH FOR ILLEGAL DRUGS DID NOT VIOLATE THE FOURTH AMENDMENT AND 18 U.S.C. § 3109, WHEN THEY FORCIBLY ENTERED A SMALL APARTMENT IN THE MIDDLE OF THE AFTERNOON, 15-20 SECONDS AFTER KNOCKING AND ANNOUNCING THEIR PRESENCE. THE DECISION OF THE COURT BELOW CREATES A COMPLEX AND UNWORKABLE MATRIX OF RULES THAT HAVE BEEN REJECTED BY THIS COURT IN PRIOR CASES DEALING WITH THE EXECUTION OF SEARCH WARRANTS.

Amici support the position of the petitioner, United States of America, and its efforts to eradicate the scourge of drugs in our homeland streets. What has been termed the "war on drugs" is a very real struggle, and police and federal law enforcement agents are front-line combatants. Their actions in serving search warrants is a vital part of that struggle. It involves activity that usually carries great risk to the officers involved and requires the officers to make split-second decisions under great pressure.

As law enforcement administrators, trainers, and legal advisors, *amici* appreciate the need to follow the guidelines of this Court for obedience to the dictates of the Fourth Amendment. We also know that law enforcement officers need clear and workable rules in order to carry out their responsibilities in this area of activity.

Amici filed friend of the court briefs on behalf of law enforcement in *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Richards v. Wisconsin*, 520 U.S. 385 (1997), and *United*

States v. Ramirez, 523 U.S. 65 (1998). In the decisions reached by the Court in these cases, three principles were adopted, among others:

- The Fourth Amendment does not "mandate a rigid rule of announcement." *Wilson*, 514 U.S. at 934.
- Blanket exceptions to the Fourth Amendment knock and announce requirements are not permitted under the Fourth Amendment. *Richards*, 520 U.S. 385 (1997).
- Mechanical formulas for the amount of time officers must wait before making a forcible entry, and property damage as a controlling factor in reaching the decision to make such an entry, were rejected in favor of the "general touchstone of reasonableness . . . [governing] the method of execution of the warrant." *Ramirez*, 523 U.S. at 71 (1998).

In constructing its matrix of rules and sub-rules, the court below has, in effect, rejected the "general touchstone of reasonableness" and the "totality of the circumstances" approach adopted by this Court in *Whren v. United States*, 517 U.S. 806 (1996). It has adopted in its place a mechanical approach rejected by most courts that have applied the Court's cases. *See, e.g., United States v. Pennington*, 2003 U.S. App. Lexis 5832 (6th Cir. 2003) (eight to ten seconds was a reasonable period of time for officers to wait before forcing entry into a home to serve a search warrant for drugs where officers heard a person running away from the door after officers knocked and announced their presence); *United States v. Pinson*, 321 F.3d 558 (6th Cir. 2003) (reasonableness, not time, determines the issue; five to ten seconds delay was reasonable); *United States v. Sargent*, 319 F.3d 4 (1st Cir. 2003) (five seconds between police officers' knock and announcement and a forced entry into an apartment was reasonable based on a threat to the safety of the officers);

United States v. Goodson, 165 F.3d 610 (8th Cir.), cert denied, 527 U.S. 1030 (1999) (delay of 14-20 seconds before a forced entry did not violate the Fourth Amendment where officers searched a one story ranch house for crack cocaine at 1:44 a.m.); *United States v. Jenkins*, 175 F.3d 1208, cert. denied, 528 U.S. 913 (1999) (a delay of 14-20 seconds before forcing entry where search of defendant's residence took place at 10 a.m. was approved); *United States v. Jones*, 133 F. 3d 358 (5th Cir.), cert. denied, 523 U.S. 1144 (1998) (observing that courts have generally found no violation "when officers have waited more than 5 seconds," and holding that "[i]n drug cases, where drug traffickers may so easily and quickly destroy the evidence of their illegal enterprise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry."); *United States v. Spikes*, 158 F. 3d 913 (6th Cir. 1998) (declining "to create a bright-line rule for every case, i.e., that waiting less than five seconds is per se unreasonable while waiting more than five seconds is per se reasonable under the Fourth Amendment"; the court held a four-second wait after knocking, preceded by a bullhorn announcement of at least 15 seconds, was sufficient); *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993) (a delay of seven seconds was sufficient before forcing entry where "[t]here was no noise coming from the apartment * * * that would have made it difficult for [defendant] to hear" the officers' announcement, the "motel room was small," and informants indicated that defendant "was likely to flush the cocaine * * * down the toilet."). *See also*, cases discussed in Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on "Knock and Announce,"* 25 AM. J. CRIM. L. 545 (1998); Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 U. MO. K. C. L. REV. 559 (1998).

Amici know that in drug cases similar to this there are two principal concerns for police officers executing search warrants on premises: (a) the fact that drug sellers are usually armed, and (b) that drug evidence can be disposed of in a few seconds by flushing it down any available plumbing fixture. In this case several weapons were found in respondent's apartment, including at least one that was loaded, and the officers' delay in making their entry was far in excess of that necessary for respondent to destroy the evidence. Based on what was objectively reasonable under the totality of the circumstances, a delay of less than 15-20 seconds would have been permissible for a forcible entry under the precedents of this Court, with or without damage to respondent's door.

While *amici* believe this Court would agree with this statement, we seek another, equally important, resolution of this case. We respectfully ask the Court to discourage, in the clearest terms possible, the adoption by state and federal courts of unduly complex rules for deciding similar cases and to urge these courts to follow this Court's rejection of mechanical, per se approaches. Artificial and strained rules similar to those constructed by the court below are not merely violative of this Court's objective reasonableness standard, but are unworkable and will result in jeopardizing officers' safety and the destruction of evidence, while defeating the Fourth Amendment's core warrant preference.

CONCLUSION

Amici urge this Court to uphold the constitutionality of the police conduct involved in this case with a clear statement that the approach taken by the court below violates the standard of objective reasonableness adopted by this Court in *Wilson*, *Richards*, and *Ramirez*.

Respectfully submitted,

Of Counsel:

GENE VOEGTLIN, ESQ.
International Association of Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

RICHARD WEINTRAUB, ESQ.
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram
Chicago, Illinois 60657-4330

Counsel for Amici Curiae:

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective Law Enforcement, Inc.
841 West Touhy Ave.
Park Ridge, Illinois 60068-3351
E-mail: AELE@aol.com

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137-4900
Tele/Fax (630) 858-6392
E-mail: lelp@xnet.com